Cross-border Insolvency and Legal Transnationalisation

by

Professor Rosalind Mason, Queensland University of Technology[1]

The last twenty years have seen an explosion of approaches for dealing with an inevitable consequence of globalised markets, that of cross-border insolvencies. This article places phenomena such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency and Cross-border Insolvency Agreements (also known as Protocols) within the context of developing laws on international commercial transactions. First it briefly describes the evolution of the international commercial law (sometimes known as the law merchant) to provide a context to understanding the international commercial responses to the problems created by cross-border insolvencies. Next, it outlines the range of approaches being adopted by States and multilateral bodies in recent decades to resolve cross-border insolvency issues. Finally it draws some preliminary conclusions on the potential implication of this transnationalisation process and broader international commercial law perspective, in particular on the capacity of Cross-Border Insolvency Agreements to address cross-border insolvency issues.

1. Introduction

While there has been cross-border (in the sense of inter-community) trade and commerce from time immemorial, the recent global financial crisis has starkly demonstrated a new phenomenon - the internationalisation of national economies. Improvements in technology have facilitated the easy movement of people as well as tangible and intangible assets around the world. Firms have increasingly operated on a global basis with integrated production of goods, delivery of services, provision of capital and coordinated business systems that take little notice of national boundaries. Governments, whether in developed or developing nations, have initiated policies to facilitate global trade and commerce, resulting in greater interdependence.

The provision of credit is an essential ingredient of this global trade and commerce but carries with it the inherent risk of business failure. When this results in a general financial default by a business, debt recovery by individual creditors against the 'debtor' is often eclipsed by a collective insolvency proceeding. Such an event moves the issue of default from the private to the public arena – requiring regulatory sanction to enforce a collective insolvency proceeding not only between a debtor and a petitioning creditor, but also upon all creditors and other parties of interest. Where such an insolvency proceeding ensues, typically control of the debtor's property passes to an insolvency representative to liquidate and distribute to creditors or to mediate an alternative arrangement endorsed by creditors.

The regulation of collective insolvency proceedings has historically been statutorily based with little regard for connections with other jurisdictions.[2] Where there is a foreign element

[1] The research assistance of Matthew Robinson, QUT BBus/LLB student, and Angela Phillips, QUT Faculty of Law Research Assistant, is acknowledged in the preparation of this paper.

[2] For an outline of English and Australian recognition of international elements, see Mason R, 'Cross-border insolvency: adoption of CLERP 8 as an evolution of Australian insolvency law' (2003) 11 *Insolvency Law Journal* 62.

to the insolvency[3] (defined as a 'cross-border insolvency') that requires resolution, private international law provides an organising construct for such issues. For example, will a local court exercise jurisdiction and if so, what law will it apply? Will a foreign court recognise and enforce a local order commencing the insolvency proceeding and appointing an insolvency representative and what effect might that have any proceedings in that foreign jurisdiction?

The presence of such foreign elements in an insolvency is typically due to a business having engaged to a greater or lesser extent in international trade and commerce. Insolvency law has been described as "the root of commercial and financial law" and as it provides the policy framework to determining claims where a business has failed, it is "arguably the most important of all commercial legal disciplines".[4] '[D]ivergent attitudes to debts and debtors'[5] in domestic insolvency laws is an important dimension to assessing commercial risk in doing business in that jurisdiction or State.[6] Thus, the evolving international insolvency law to cope with cross-border insolvencies is an integral element of international commercial law.

The ever greater frequency and value of modern international transactions and the lack of legal certainty caused by domestic laws, such as insolvency law, that were never intended to deal with international transactions are having an impact.[7] Professor Dalhuisen[8] observes a legal transnationalisation process occurring in recent decades and the emergence of an international commercial and financial legal order, with a residual role for the application of national law identified through the most appropriate private international law rules.[9]

Professor Berger[10] describes a strong similarity in the genesis for theories on international commercial law, referring to "the combined perspective of comparative law, usages, customs and practices of international commerce and trade leads to the evolution of transnational legal

[3] For example, assets in or business transactions that cross jurisdictional boundaries.
[4] Wood PR, *Principles of International Insolvency*, Sweet & Maxwell, London, 1995 at p 1. Also see Wood P, *Law and Practice of International Finance*, Sweet & Maxwell, university edition, 2008, at 1-23: "bankruptcy is the most crucial indicator of the attitudes of a legal system in its commercial aspects and why the main disagreements in the law of advanced legal systems grow out of insolvency law."
[5] Halliday TC & Carruthers BG, *Bankrupt: Global Lawmaking and Systemic Financial Crisis*, Stanford University Press, Stanford, 2009 at 33.
[6] The term used in this article to indicate a jurisdictional area and to distinguish regulation by nation states from commercial solutions.
[7] Dalhuisen JH, 'Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria' (2006) 24 *Berkley Journal of International Law* 129 at 132.
[8] Where there are such international transactions, "traditional conflict rules of private international law, always pointing to the applicability of a national law, here reach their useful end": Dalhuisen, JH, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, 3rd ed, Hart Publishing, Oxford and Portland, Oregon, 2007 at 6. Professor Berger notes the preference for substantive law solutions reflected in a transnational approach "to avoid the uncertainties and unpredictable effects caused by the application of complicated conflict of laws doctrines and of domestic substantive law rules, which are frequently inadequate to solve the manifold legal problems of contemporary commercial law": Berger KP, *The Creeping Codification of the Lex Mercatoria* Kluwer Law International, 1999 at 2 cited in Pryles M, "Application of the *Lex Mercatoria* in International Commercial Arbitration" (2008) 31(1) *UNSW Law Journal* 319 at 320.
[9] Dalhuisen, JH, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, 3rd ed, Hart Publishing, Oxford and Portland, Oregon, 2007 at 159.
[10] Berger KP, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, 1999 at 2 cited in Pryles M, "Application of the *Lex Mercatoria* in International Commercial Arbitration" (2008) 31(1) *UNSW Law Journal* 319 at 320.

principles, rules and standards which are applied in practice[11] in order to arrive at economically sensible solutions to transnational commercial disputes."

International insolvency law is an element of this emerging international commercial and financial legal order. In recent decades, the limitations of domestic solutions to resolve complex international insolvencies of enterprise groups[12] that engage in global trade and commerce have prompted responses at a multilateral level – for example on a global basis, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-border Insolvency (Model Law) and on a regional level, the European Insolvency Regulation (EIR). Yet even these initiatives as adopted by a large number of trading nations have their limitations when faced with the complexities inherent in the liquidation of a Lehman Brothers financial services firm or the restructuring of a Nortel telecommunications business. Instead, debtors, creditors, financiers and others through their professional advisers are utilising Cross-border Insolvency Agreements (CBI Agreements).

CBI Agreements are arrangements agreed upon by the parties to facilitate cross-border cooperation and coordination of multiple insolvency proceedings in different jurisdictions whether concerning a single debtor[13] or an enterprise group.[14] They have been approved by courts, in common law and civil law jurisdictions alike,[15] although this is not necessary for their effectiveness. They represent a commercial response to international insolvency issues that complements domestic insolvency and private international laws, which are proving inadequate to produce timely and effective outcomes for a globalised business community.

The aim of this article is to place the range of responses to cross-border insolvency issues, in particular Cross-border Insolvency Agreements, in the context of this transnationalisation process and the emerging international commercial and financial legal order. By so doing, it highlights the potential role of CBI Agreements, a practical response by merchants, financiers and professional advisers, as a 'soft law' available to courts to resolve disputes.

---

[11] Lord Michael Mustill, 'The New Lex Mercatoria: the First Twenty Five Years' (1988) 4 *Arbitration International* 26 at 91 compiled a list of principles based on 25 years of international arbitration and Professor Berger compiled a list of some 78 principles: Berger KP, *The Creeping Codification of the Lex Mercatoria* Kluwer Law International, 1999 at 210, both cired in Pryles M, "Application of the *Lex Mercatoria* in International Commercial Arbitration" (2008) 31(1) *UNSW Law Journal* 319 at 322-323.

[12] UNCITRAL Legislative Guide on Insolvency Law Part Three: Treatment of enterprise groups in insolvency, (pre-release 2010) at [5] "Despite the absence of legislation, judges and insolvency representatives in many countries, faced with issues that may better be addressed by reference to a single enterprise rather than a single corporate entity, have developed solutions to achieve results that more accurately reflect the economic reality of modern business." http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html

[13] UNCITRAL Practice Guide on Cross-border Insolvency Cooperation 2010, at p 27. http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html

[14] UNCITRAL Legislative Guide on Insolvency Law Part Three: Treatment of enterprise groups in insolvency, (pre-release 2010) at p 87 ff.

[15] UNCITRAL Practice Guide on Cross-border Insolvency Cooperation 2010 at Annex 1 provides summaries of 44 cases featuring cross-border insolvency agreements in a range of jurisdictions. Also UNCITRAL Model Law on Cross-border Insolvency: The Judicial Perspective (2012), at [154] – [187] on cooperation and coordination under the Model Law together with references to relevant cases, which are summarised in the Annex. http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html

The article first outlines the historical development of international commercial law, including its role in recent decades which have been characterised by an escalating globalisation of trade and commerce. Next it introduces some of the issues that arise for merchants when an international insolvency strikes. This prefaces a examination of the ways in which States and non-State actors, including 'merchants' broadly defined, have attempted to resolve international insolvency and related commercial issues. In particular, it examines Cross-border Insolvency Agreements and how they qualify as part of the new law merchant. Finally it draws some conclusions on consequences of this response to international insolvencies being a part of a new international commercial law.

2. International Commercial Law

Writing some fifty years ago, Professor Schmitthoff referred to the rise of international commercial law as one of the most significant legal developments of the time.[16] He referred to three stages in its historical development. It began in the Middle Ages as "a body of truly international customary rules governing the cosmopolitan community of international merchants" with an international character and uniformity derived from "the unifying character of the law of the fairs, the universality of the customs of the sea, the special courts dealing with commercial disputes, and the activities of the notary public".[17]

In this first stage, international commercial law, or the law merchant as it is sometimes known, comprised the customs of the markets and fairs; as well as maritime customs relating to trade.[18] They were often created in response to the difficulties of trading at a distance,[19] and included areas of law such as agency; bailment; and bills of exchange.[20] The influence of these laws may well be reflected in the fact that many civil law countries still restrict their insolvency law to merchants or traders. Another aspect that reflects many modern insolvency laws is the notion of the equal treatment of foreign creditors and local creditors –merchants were protected travelling from fair to fair[21] and restrictions against foreign merchants were prohibited. Nevertheless in practice, and this resonates with modern experience, 'local merchant courts were not always impartial in their treatment for foreigners' and 'in some

[16] While commentators have used a variety of terms such as international business law or international trade law, for the sake of consistency, 'international commercial law' will be used throughout. ; Schmitthoff CM, "International Business Law: A New Law Merchant" (1961) II *Current Law and Social Problems* 129 reprinted in Cheng C-J (ed), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Martinus Nijhoff Publishers / Graham & Trotman, Dordrecht, Boston, London, 1988 at 20.

[17] Schmitthoff CM, "International Business Law: A New Law Merchant" in Cheng C-J (ed), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Martinus Nijhoff Publishers / Graham & Trotman, Dordrecht, Boston, London, 1988 at 21-22. The notary public drafted contracts which were copied or adopted from a model standard form (at 24).

[18] Berman HJ, 'The Law of International Commercial Transactions' (1988) 2 *Emory Journal of International Dispute Resolution* 235 at 240.

[19] Epstein RA, 'Reflections on the Historical Origins and Economic Structure of the Law Merchant' (2004-2005) 5 *Chicago Journal of International Law* 1.

[20] Kerr C, 'The Origin and Development of the Law Merchant' (1928-1929) 15 *Virginia Law Review* 350 at 362. Professor Berman also refers to 'the development of a bankruptcy law which took into account the existence of a sophisticated system of commercial credit': Berman HJ, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Mass, 1983 at 349.

[21] The Magna Carta of 1215 recognised the special status of merchants: Trakman L, 'From the Medieval Law Merchant to e-Merchant Law' (2003) 53 *University of Toronto Law Journal* 265 at 280.

cases, local merchant courts insisted that foreign merchants should bind themselves unconditionally to forum law.'[22]

In England, there was an early statutory recognition of international commercial law, for example in 1303 a Statute, *Carta Mercatoria,* recognised the law merchant as an independent source of law, exempted foreign traders from local taxes, and gave them freedom to trade throughout England. Local merchant courts, such as the Borough and Pie Powder Courts,[23] operated during the fairs, and judges and juries comprised of merchants identified the applicable customs, although there were some written sources such as the Red Book of Bristol. The medieval law merchant varied with the markets and products covered "but the common outstanding feature was that both this law and the courts that administered it were autonomous." Other common factors were "their customary character, summary jurisdiction, and spirit of equity and common sense that was not concerned with technicalities."[24]

In the second stage during the eighteenth and nineteenth centuries when there was a developing notion of 'national sovereignty',[25] international commercial law was gradually incorporated into domestic laws in England and on the continent through adoption as part of the common law or of civil codes. In England, the older courts started to disappear, and eventually the requirements that the defendant had to be a merchant and that commercial law or custom was applicable disappeared. In 1765, Lord Mansfield in *Pillans v Van Mierop*[26] stated that "the law of merchants and the law of the land are the same" although he recognised that "commercial law was to evolve alongside commercial practice",[27] which left commercial custom and practices as a potential independent source of law, although more in the nature of courtesy or *comitas*.[28]

In addition to incorporation through case law, there were a series of legislative 'great codifications' at the end of the nineteenth century, e.g. the *Bills of Exchange Act* 1882, the

[22] Trakman L, 'The Evolution of the Law Merchant: Our Commercial Heritage Part I Ancient and Medieval Law Merchant" (1980) 12 *Journal of Maritime Law and Commerce* 1 at 21.
[23] Dalhuisen, JH, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, 3rd ed, Hart Publishing, Oxford and Portland, Oregon, 2007 at 9.
[24] Dalhuisen, JH, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, 3rd ed, Hart Publishing, Oxford and Portland, Oregon, 2007 at 9 citing W Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge, CUP, 1904).
[25] Schmitthoff CM, "International Business Law: A New Law Merchant" (1961) *Current Law and Social Problems* 129 reprinted in Cheng C-J (ed), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Martinus Nijhoff Publishers / Graham & Trotman, Dordrecht, Boston, London, 1988 at 22.
[26] [1765] 97 ER 1035; [1765] 3 Burr 1663, 1669.
[27] He often expressed the view that the 'mercantile law' was founded on an international basis: Schmitthoff CM, "International Business Law: A New Law Merchant" (1961) *Current Law and Social Problems* 129 reprinted in Cheng C-J (ed), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Martinus Nijhoff Publishers / Graham & Trotman, Dordrecht, Boston, London, 1988 at 26 citing *Pelly v Royal Exchange Assurance* (1757) Burr 341.
[28] Dalhuisen, JH, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, 3rd ed, Hart Publishing, Oxford and Portland, Oregon, 2007 at 10.

Partnership Act 1890 and the *Sale of Goods Act* 1893.[29] Yet there was still recognition of its ongoing existence, for example in s 61(2) *Sale of Goods Act* 1893:

> The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act … shall continue to apply to contracts for the sale of goods.

While on the European Continent commercial courts continued to lead an independent life for longer, codification resulted in the waning of "the international flavour of commercial law and of the commercial courts."[30]

Finally, scholars refer to a third evolutionary stage in the twentieth and twenty-first centuries based on a significant expansion of international trade and commerce and the growth of an 'international community of merchants' that continues to create autonomous legal orders on a transnational scale.[31] Professor Berman argues that the universality of international commercial law derives from the common problems facing merchants, financiers and others as well as the fact that such persons form a transnational community, which has existed more or less continuously for centuries. This mercantile community continues to develop international commercial law through custom and practices, industry association regulations and arbitration tribunal decisions and together these constitute a body of customary law.[32] These recent developments are also characterised by the diversity of the international commercial community, with merchants originating from all continents and operating in a truly global even a-national fashion.

The traditional description of international commercial law by Berman[33] is that it is 'essentially an international body of law, founded on the commercial understandings and contract practices of an international community composed principally of mercantile, shipping,[34] insurance, and banking enterprises of all countries.'[35] It features in writings from civil law as well as common law systems. For example, Professor van Houtte[36] refers to many continental European authors who claim that international commercial transactions are

---

[29] Bottomley S, 'What is Commercial Law?' Paper presented at "Challenges to Commercial Law" Conference, The Australian National University, Canberra, 17 September 2001 (cited with author's permission, references omitted).

[30] Dalhuisen, JH, *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law*, 3rd ed, Hart Publishing, Oxford and Portland, Oregon, 2007 at 10.

[31] Berman HJ, 'The Law of International Commercial Transactions' (1988) 2 *Emory Journal of International Dispute Resolution* 235 at 243. Goldstajn A, 'Reflections on the Structure of the Modern Law of International Trade' in Sarcevic P (ed) *International Contracts and Conflicts of Law*, Graham & Trotman and Martinus Nijhoff, London, 1990 at 14.

[32] Berman HJ, 'The Law of International Commercial Transactions' (1988) 2 *Emory Journal of International Dispute Resolution* 235 at 236–7.

[33] Berman HJ, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Mass, 1983. Also see Basile ME et al eds, *Lex Mercatoria and Legal Pluralism: A Late Thirteenth Century Treatise and its Afterlife*, The Ames Foundation, Cambridge, Mass. 1998.

[34] For an insightful article on the tensions between international insolvency law and maritime laws, see Devlin J, 'The UNCITRAL Model Law on cross-border insolvency and its impact on maritime creditors' (2010) 21(2) *Journal of Banking and Finance Law and Practice* 95.

[35] Berman HJ, 'The Law of International Commercial Transactions' (1988) 2 *Emory Journal of International Dispute Resolution* 235 at 298.

[36] Van Houtte, H, *The Law of International Trade Law*, 2nd ed, Sweet & Maxwell, London, 2002 at 24-25.

subject to such a law. Its rules are founded on trade usages developed for international trade; on standard clauses (often drawn up for certain trade sectors); on uniform laws, model laws and conventions; on general principles of law; and on the contract negotiated by the parties.[37]

A narrower view is taken by Professor Goode who confines customary law to 'that part of transnational commercial law that derives from the international practice of merchants.' He excludes contract and treaty law found in 'standard-term contracts, codes of practice promulgated by international business organisations and even international conventions'.[38] He supports this distinction by referring to an essay by Lord Justice Mustill pointing out that the law merchant 'simply exists as a product of spontaneous generation, whereas international conventions and standard-term international contracts have as their objective the harmonisation of rights, duties and practices.'[39]

Other critics of the notion of an international commercial law find the concept of 'an autonomous international legal order, detached from all national laws and existing by its own force'[40] controversial. However Professor Michaels comments that the unresolved discussions concern not so much the existence but rather "the theoretical possibility of an 'a-national' law merchant or a 'global law without a state'."[41] By separating out the political and the economic, the differing opinions can be held in tension. Dr Fazio refers to a new law merchant "emerging from the activities of the economic operators and from processes that do not necessarily have a political nature."[42]

As political solutions to international insolvency issues through domestic law making by States have not kept pace with the needs of international commerce, then economic solutions have been found by the merchants, financiers and their professional advisers. The CBI Agreements are providing a unique economic solution that comprises a custom within international commercial law, which, when 'endorsed' by domestic courts, can reconcile the local and the global.

3. Responses to Cross-border Insolvency Issues

When a debtor becomes subject to a collective insolvency proceeding that crosses jurisdictional borders, a key factor for the transnational business community involved is the extent to which their expectations are met through the interplay of the legal systems involved.

---

[37] Van Houtte, H, *The Law of International Trade Law*, 2nd ed, Sweet & Maxwell, London, 2002 at 25.
[38] Goode R, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) 54 *International & Comparative Law Quarterly* 539 at 547.
[39] Goode R, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) 54 *International & Comparative Law Quarterly* 539 at 547 citing 'The New Lex Mercatoria: The First Twenty-Five Years' in M Boss & I Brownlie (eds), *Liber Amicorum for Lord Wilberforce*, Clarendon Press, Oxford, 1987, 149 at 152-3.
[40] Goode R, 'Rule, Practice, and Pragmatism in Transnational Commercial Law' (2005) 54 *International & Comparative Law Quarterly* 539 at 541 observed that 'the desire to escape from the conflict of laws ... has powered the drive to assert the existence of the lex mercatoria as an autonomous international legal order, detached from all national laws and existing by its own force.'
[41] Michaels R, 'The true Lex Mercatoria: Law Beyond the State' (2007) 14(2) *Indiana Journal of Global Studies* 447 at 449.
[42] Fazio, S, *The Harmonization of International Commercial Law*, Kluwer Law International, The Netherlands, 2007 at 12-13 citing Mertens, H, "*Lex Mercatoria:* A Self-Applying System Beyond National Law?" in Teubner, G (ed), *Global Law Without a State*, Dartmouth, 1997 at 31 ff.

There is a lack of certainty around the impact of insolvency law on existing rights and interests and party expectations. This affects international trade and commerce as parties assess a jurisdiction's insolvency law and its capacity to handle cross-border elements as part of their risk assessment in doing business there.

Differences in domestic insolvency laws may result in different outcomes for merchants in a given cross-border insolvency. Depending on the laws of the jurisdiction in which a particular insolvency proceeding is taking place, outcomes may vary depending on the approach to whether the estate that is subject to the insolvency proceeding comprises local and foreign assets; the extent to which it recognises local and foreign creditors claims; and the effect of the insolvency on prior or incomplete transactions.

Likewise outcomes may vary for local creditors of a debtor, subject to a foreign insolvency proceeding, who is connected in some way with the jurisdiction but for which there is no local insolvency proceeding. The outcomes may vary depending on the domestic laws' approach to recognition and enforcement of the foreign proceeding and the foreign insolvency representatives access to local assets and recognition of local creditors' claims, including local secured interests or local priority rules. Uncertainty about such outcomes may lead to local creditors or the foreign representative initiating local insolvency proceedings or to the foreign insolvency representative initiating proceedings to be recognised and have their rights enforced.

Domestic insolvency laws which were once drafted to deal with individual traders or single corporate entities must now deal with multiple forms of business association often interwoven into complex business structures and engaged in sophisticated business operations. Moreover, parties may not have the 'luxury' to assess the risk of inadequate domestic insolvency laws as modern forms of international trade and commerce may bring a party into connection with a jurisdiction unexpectedly – for example through commerce over the internet[43] or the speed with which tangible assets may move between jurisdictions.

In the wake of the Global Financial Crisis of 2008, cases abound that illustrate these complexities. The collapse of Lehman Brothers, a global financial services firm, with various entities within the group filing in insolvency across numerous jurisdictions is providing ongoing challenges to debtors, creditors, regulators and courts alike. For example, conflicting

[43] Commerce that uses the medium of the internet is inherently international requiring the law to address arguably 'jurisdictional-less' transactions: Trakman L, 'From the Medieval Law Merchant to E-Merchant Law' (2003) 53 *University of Toronto Law Journal* 265 at 284-5 refers to a new cyberspace Law Merchant resulting in online dispute resolution services e.g. for domain name proceedings. Also see Hang LQ, 'Comments: Online Dispute Resolution Systems: The Future of Cyberspace Law' (2001) 41 *Santa Clara Law Review* 837.

approaches to the effect of ipso facto clauses[44] in an insolvency context are evident in parallel legal proceedings occurring in the United States and England.[45]

Given these issues and the limitations of domestic laws, various multilateral bodies have sought to resolve international insolvency and related commercial issues. Multilateral organisations of member States have taken an interest in insolvency and include the United Nations Commission on International Trade Law (UNCITRAL); the World Bank; and the International Institute for the Unification of Private International Law (UNIDROIT). Professional bodies comprising lawyers, accountants and other professions who advise merchants on insolvency matters have also engaged with the issues – for example, the International Bar Association (IBA); INSOL International (INSOL); and the International Insolvency Institute (III).

The various responses to these issues can usefully be understood through classifying the different approaches. Some are domestically focussed however most are multilateral in scope initiated by organisations as well as by the transnational community of merchants, financiers and professional advisers caught up in a particular business failure.

3.1. Uniform Insolvency Laws

An obvious approach is for all States to enact uniform substantive insolvency laws. This is not likely to be achieved in any comprehensive manner in the foreseeable future because each State's insolvency laws interact in a complex manner with a range of their other laws and are intimately linked to their commercial, financial and social fabric.[46] This militates against uniform laws as a solution. However, multilateral bodies with an interest in international trade and commerce have promoted convergence of the different domestic insolvency laws.

Model insolvency laws have been drafted with a view to harmonisation, if not uniformity. UNCITRAL produced a *Legislative Guide on Insolvency Law* (2004)[47] which is intended "to be used as a reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the adequacy of existing laws and regulations".[48] However, UNCITRAL has noted that the rate of adoption of their legislative standards has varied significantly. It has stressed the importance of technical cooperation and assistance by the

[44] It is argued that contractual provisions to modify the scheme for payment priority are unenforceable ipso facto clauses under United States bankruptcy legislation as they inappropriately modify a debtor's interest in a contract solely because of a bankruptcy filing.

[45] The Lehman Brothers website http://www.lehman.com/ directs readers to the Chapter 11 proceedings in the United States – see *Lehman Brothers Special Financing Inc v BNY Corporate Trustee Services Ltd* (Bankr SDNY 25 January 2010)

[46] Fletcher IF, 'Cross-Border Cooperation in Cases of International Insolvency: Some Recent Trends Compared' (1991-1992) 6/7 *Tulane Civil Law Forum* 171 at 175.

[47] The Guide was endorsed by the IBA which itself in 1997 had commenced drafting a Model Bankruptcy Code: Gispen GH & Griffiths NR, 'Model Bankruptcy Code', Paper presented to the *International Bar Association Section on Business Law Conference*, Barcelona, 1999.

[48] http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html . On the matter of cross-border insolvency, it recommends at p 14 "To promote coordination between jurisdictions and facilitate the provision of assistance in the administration of insolvency proceedings originating in a foreign country, insolvency laws should provide rules on cross-border insolvency, including the recognition of foreign proceedings, by adopting the UNCITRAL Model Law on Cross-Border Insolvency."

UNCITRAL Secretariat, because legislative technical assistance, in particular to developing countries, is no less important than the formulation of uniform rules itself.[49]

The World Bank produced their own guidelines entitled *Principles for Effective Insolvency and Creditor Rights Systems* (2005).[50] These Guidelines 'emphasize contextual integrated solutions and the policy choices involved in developing those solutions'.[51] Significantly, the International Monetary Fund (IMF) and the World Bank at times require bankruptcy reform in developing countries as a condition of loan support, thus promoting the convergence of insolvency law.[52]

States within regional economic groupings have also attempted to arrive at uniform insolvency laws through insolvency treaties. Although never implemented, the first draft *EC Convention on Bankruptcy and Related Matters* (1970)[53] contained draft uniform provisions. It would have required contracting states to enact a 'Uniform Law' into domestic law, while permitting states to make reservations on their incorporation.[54] Its provisions covered 'relation back'; actions for fraud against creditors; the doctrine of set-off; the extension of the bankruptcy of firms or legal entities to persons directing or managing them; and proof of the spouse's claim to property, which would otherwise be presumed to be acquired with the funds of the bankrupt; and the bankruptcy of the vendor in the case of a contract of sale with retention of title. However, the 'Uniform Law' did not feature in subsequent draft European insolvency conventions which essentially approached international insolvency issues through uniform recognition and enforcement.

In 2010, the European Parliament has revisited the notion of uniform insolvency laws through its report on the *Harmonisation of Insolvency Law at EU Level*. The report outlines differences between national insolvency laws and identifies a number of areas of insolvency law where harmonisation at EU level is believed to be worthwhile and achievable. Primarily these comprise "a possible common test of insolvency as a requirement of a formal insolvency process; the formal aspects of lodging and dealing with claims in a formal insolvency; certain aspects of the manner in which reorganisation plans are adopted and their

---

[49] Report of the UNCITRAL General Assembly A/66/17 (44th session, 27 June-8 July 2011, New York): http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V11/846/34/PDF/V1184634.pdf?OpenElement.

[50] These were drafted in 2001 and revised in 2005: Principles for Effective Insolvency and Creditor Rights Systems (2005) http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRPrinciples-March2009.pdf .

[51] Johnson GW, 'The World Bank's Consensus Building Role: Developing Principles for Effective Insolvency and Creditor Rights Systems and Related Efforts to Strengthen Capacity', Paper presented to the *INSOL Sixth World Congress*, London, 2001 at 3.

[52] Buxbaum HL, 'Conflict of Economic Laws: From Sovereignty to Substance' (2001-2002) 42 *Virginia Journal of International Law* 931 at 946 citing Westbrook JL, 'Colloquy: A Global Solution to Multinational Default' (2000) 98 *Michigan Law Review* 2276 at 2278.

[53] Commission Document 3.327/1/XIV/70-E – also available in Dalhuisen JH, *Dalhuisen on International Insolvency & Bankruptcy*, Matthew Bender & Company Inc, New York, 1984 vol 1, Part III (loose-leaf updated to 1984) at Appendix C-1A. For commentary, see Hunter M, 'The Draft Bankruptcy Convention of the European Economic Communities' (1972) 21 *International & Comparative Law Quarterly* 682 at 694-7.

[54] Article 76 (1970 Draft).

contents; the rules regarding so-called detrimental acts and the interrelationship between contractual rights of termination and insolvency; and finally directors' responsibilities."[55]

The difficulties in achieving universal agreement on substantive provisions[56] are evident in that even within the principles and guidelines that have been promoted there are often alternative provisions on important matters of policy.[57]

In addition to specific insolvency texts, multilateral bodies are drafting Legislative Guides on related commercial topics. UNCITRAL has concluded a number of texts on international trade law issues that have the potential to intersect with insolvency laws.

UNCITRAL's Working Group VI on Security Interests[58] closely collaborated with UNCITRAL's Working Group V (Insolvency) to produce the *UNCITRAL Legislative Guide on Secured Transactions* (2007).[59] The aim of this project was to ensure coordination of the treatment of security interests in insolvency with the *UNCITRAL Legislative Guide on Insolvency Law*. UNCITRAL cooperated closely with the Permanent Bureau of the Hague Conference on Private International Law in the preparation of the chapter on conflict of laws. It also coordinated with the International Institute on Private International Law (UNIDROIT) to avoid overlap with the *Convention on International Interests in Mobile Equipment* (Cape Town, 2001) and the UNIDROIT *Convention on Substantive Rules for Intermediated Securities* (Geneva, 2009).

The UNCITRAL *Supplement on Security Rights in Intellectual Property* (2010) may also be relevant to resolving cross-border insolvency issues where interests in intellectual property are involved.[60] In preparing the supplementary legislative guide, Working Group VI on Security Interests referred certain insolvency-related matters to Working Group V (Insolvency Law). It also cooperated with the World Intellectual Property Organisation (WIPO) and other observer intellectual property organizations from the public and the private sector to ensure that the Supplement would be sufficiently coordinated with law relating to intellectual property. In addition, it cooperated closely with the Permanent Bureau of the

---

[55] European Parliament Directorate General for Internal Policies, Policy Department: Legal and Parliamentary Affairs, *Harmonisation of Insolvency Law at EU Level*, 2010 at 6 http://www.insol-europe.org/eu-research/

[56] Buxbaum HL, 'Conflict of Economic Laws: From Sovereignty to Substance' (2001-2002) 42 *Virginia Journal of International Law* 931 citing LoPucki (1999) 84 *Cornell Law Review* 696 notes "In bankruptcy, fundamental inconsistencies across jurisdictions in both bankruptcy and related laws make harmonization appear unattainable".

[57] Yet even where there appears to be a common approach on policy, there are often difficulties in achieving uniform enactment and implementation in practice. As noted by Lord Millet, '[n]o branch of the law is moulded more by considerations of national economic policy and commercial philosophy': Millett P, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *International Insolvency Review* 99 at 109.

[58] UNCITRAL Working Group VI on Security Interests is also working on a text on the registration of security rights in movable assets.

[59] http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf The UNCITRAL Working Party V is also examining Directors' responsibilities and liabilities in insolvency and pre-insolvency cases. This topic was proposed by the United Kingdom, INSOL International and the International Insolvency Institute and concerns the responsibility and liability of directors and officers of an enterprise in insolvency as well as pre-insolvency cases.

[60] http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_Ebook_Suppl_SR_IP.pdf

Hague Conference on Private International Law in the preparation of chapter X which deals with the law applicable to a security right in intellectual property.

The Institut International pour l'Unification de Droit Privé (International Institute for the Unification of Private Law), commonly known as UNIDROIT[61] has also completed texts on issues that may have some relevance for international insolvencies – for example its *Conventions on Mobile Equipment, including aircraft equipment*.

3.2. Uniform Choice of Law

States have achieved more success in addressing cross-border insolvency issues by adopting a uniform approach to choice of law through regional cross-border insolvency treaties or conventions. This has meant that, even with member States' different domestic insolvency laws, a uniform referral to an applicable local or foreign law[62] should result in the same outcome, regardless of the member State in which the dispute arose.

The *Nordic Convention on Bankruptcy between Norway, Denmark, Finland, Iceland and Sweden* (1933) recognises the law of the place of insolvency adjudication (the 'home state') as determining almost all the effects of the order in all member states without the need for further formalities. Article 1 specifies recognition of the divesting of the administration of the debtor's property; the extent of the assets and the property therein; the bankrupt's rights and obligations during the bankruptcy; the administration of the bankrupt's property and transactions in respect thereof; the rights of creditors in respect of the payment of their claims; the allocation of the assets; the composition with creditors or other mode of settlement. There is also an immediate general stay of creditor action.[63]

With effect from 2002, the *EU Insolvency Regulation* (EIR)[64] (2002) prima facie applies the law of the 'home state' to the effects of the insolvency proceedings throughout the applicable European states.[65] The development of the EIR was influenced by the *Council of Europe Convention on Certain International Aspects of Bankruptcy* (1990). This instrument, known as the Istanbul Convention, never came into effect but it had provided that the applicable law in secondary proceedings was prima facie to be the state where that insolvency proceeding was opened.[66]

3.3. Uniform Recognition Laws

States and multilateral organisations have achieved greater success in addressing international insolvency through adopting (to greater or lesser extent) uniform laws on recognition of

[61] http://unidroit.org/ UNIDROIT, founded in 1926 and based in Rome, is an independent intergovernmental organisation whose purpose is "to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives."
[62] Juenger FK, *Choice of Law and Multistate Justice*, Martinus Nijhoff Publishers, Dordrecht, 1993 at 45-6.
[63] Bogdan M, 'The Nordic Bankruptcy Convention' in Ziegel JS (ed) *Current Developments in International and Comparative Corporate Insolvency Law*, Clarendon Press, Oxford, 1994 at 702.
[64] EU Insolvency Regulation (1346/2000) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF
[65] Article 4(1) (EU Regulation on Insolvency Proceedings) states the law applicable to insolvency proceedings and their effects is prima facie the state where such proceedings were opened.
[66] Article 19 (Istanbul Convention).

insolvency proceedings and insolvency representatives. This approach accepts a lack of agreement on fundamental issues such as jurisdiction and a consequent likelihood of concurrent insolvency proceedings. Therefore it focuses on the recognition and enforcement of 'foreign proceedings' and coordination and cooperation between concurrent proceedings.[67]

A number of States legislate for recognition of and cooperation with foreign insolvency adjudications or proceedings. Also, in some common law jurisdictions, there are statements to the effect that superior courts may rely upon an inherent jurisdiction to do so.[68] The House of Lords in *McGrath v Riddell* ordered the turnover of assets in a local ancillary liquidation to a foreign principal liquidator for distribution under foreign laws. Lord Hoffmann referred to the court's 'jurisdiction at common law, under its established practice of giving directions to ancillary liquidators, to direct remittal of the English assets, notwithstanding any differences between the English and foreign systems of distribution'. He stated:

> the primary rule of private international law ... applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.[69]

While Lord Scott also allowed the appeal, he did so on the basis of a statutory provision on co-operation between courts exercising jurisdiction in relation to insolvency (s 426 *Insolvency Act 1986*) and "not from any inherent jurisdiction of the court".[70]

In Australia, similar statutory provisions permit co-operation between Australian and foreign courts in external administration matters.[71] Even with the introduction of the *Cross-border Insolvency Act 2008* (Cth) and the *Cross-Border Insolvency Regulations 2006* (UK), parties in Australia still make use of these provisions,[72] which had their origins in s 74 *Bankruptcy Act 1869* (UK) and s 122 *Bankruptcy Act 1914* (UK).

---

[67] The Hague Conference on Private International Law http://www.hcch.net/index_en.php is an international organisation established in the 19th century to work towards the progressive unification of private international law. It had no success with its 1925 model bankruptcy treaty: Nadelmann KH, 'Bankruptcy Treaties' (1943-1944) 93 *University of Pennsylvania Law Review* 58at 67. In recent year, it has concentrated on cross-border cooperation in other civil and commercial matters and insolvency is only mentioned tangentially in a number of texts. For example it excludes 'insolvency, composition and analogous matters' from the Hague Convention on Choice of Court Agreements (2005).

[68] In *Re Chow Cho Poon (Private) Limited* [2011] NSWSC 300, Mr Justice Barrett considered, but did not determine, whether the NSW court might grant recognition and declaratory relief without reference to any statutory foundation. His Honour referred at [78] to "[n]otions of comity that have, in recent years, facilitated recognition and effectuation of foreign insolvency administrations by the deployment of the local court's inherent jurisdiction."

[69] *McGrath v Riddell* [2008] UKHL 21 at [30].

[70] *McGrath v Riddell* [2008] UKHL 21 at [62].

[71] Sections 580-581 *Corporations Act 2001* (Cth). Section 22 *Cross-border Insolvency Act 2008* (Cth) provides that where there is an inconsistency between the Model Law and ss580-581, the Model Law prevails to the extent of the inconsistency.

[72] In *Re McGrath & Honey as Liquidators of HIH Insurance Ltd* [2008] NSWSC 881, Mr Justice Barrett enquired of counsel whether consideration had been given to a direct approach to the English Court and was advised that the liquidators preferred to adopt the procedure of letters of request from court to court that they

New Zealand also provides in s 8 *Insolvency (Cross Border) Act 2006* (NZ) that if a foreign court requests the aid of the High Court in relation to an insolvency proceeding, the High Court can act in aid of and be auxiliary to that court. These provisions proved useful in a cross-border bankruptcy case, *Williams v Simpson,*[73] where the court exercised its discretion under s 8 because the locally adopted UNCITRAL Model Law did not apply in the circumstances.

Nevertheless, the United Kingdom goes further than both Australia and New Zealand in that s426(5) *Insolvency Act 1986* authorises the local court to "apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction."

Such legislative provisions sometimes draw a distinction between the degree of cooperation afforded courts from 'prescribed' States[74] (an obligation to act in aid of and be auxiliary to that court) and those from other States (a discretion whether to cooperate).

Multilateral organisations have also investigated avenues to encourage recognition and enforcement. The IBA undertook one of the first modern multilateral attempts to achieve uniform recognition laws through its Model International Insolvency Cooperation Act (1989) (MIICA). This was a draft model statute for enactment as municipal legislation.[75] It did not allocate jurisdiction for insolvency proceedings, instead it encouraged auxiliary proceedings and provided mechanisms by which courts would act in aid of foreign insolvency proceedings.[76] While it was a useful step in the evolution of modern approaches to dealing with cross-border insolvency cases, no State adopted MIICA as domestic legislation.

Then in 1996, the IBA adopted an approach of encouraging uniform recognition through the action of the parties themselves. It approved a Cross-Border Insolvency Concordat[77] that provided some generalised principles intended to guide practitioners (and the courts) in harmonising cross-border insolvencies. Its first principle was that there should be a single

---

had successfully used on several earlier occasions in the HIH matter. The judge commented at [18] that "There is no reason under our law (and there appears to be none under English law) why the liquidators should not take the course they wish to take or why this court should do otherwise than assist them."

[73] [2010] NZHC 1786 at [85] Mr Justice Heath commented that article 22(1) Model Law "should inform the exercise of the s 8 discretion, in that this Court ―must be satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected before making any orders. That approach is also consistent with the application of comity and the common law principles expressed in [*Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] 3 All ER 829 (PC)]."

[74] In Australia, Corporations Regulation 5.6.74 prescribes the Bailiwick of Jersey, Canada, Papua New Guinea, Malaysia, New Zealand, Singapore, Switzerland, the United Kingdom and the United States of America. Section 426(11) *Insolvency Act 1986* defines the 'relevant country or territory as 'any of the Channel Islands or the Isle of Man, or any country or territory designated for the purposes of [s 426] by the Secretary of State by order made by statutory instrument." Those so designated include Australia, Bermuda, Canada, Cayman Islands, Hong King, Malaysia, New Zealand, Republic of Ireland, and Republic of South Africa.

[75] Powers TE, Mears RR & Barrett JA, 'The Model International Insolvency Co-operation Act' in Leonard EB & Besant JW (eds) *Current Issues in Cross-Border Insolvency and Reorganisations*, Graham & Trotman and International Bar Association, London, 1994.

[76] *MIICA* s 1(b); s 2.

[77] Perry M, 'Lining Up at the Border: Renewing the Call for a Canada-US Insolvency Convention in the 21st Century' (2000) 10 *Duke Journal of Comparative & International Law* 469 at 481 note 61.

administrative forum that would have primary responsibility for coordinating all relevant insolvency proceedings. However, it did not prescribe a principal forum or seat for the proceeding.[78] It also allowed for concurrent plenary proceedings with coordination, subject in appropriate cases to a governance protocol[79] setting out 'the responsibilities and jurisdiction of each.'[80]

The Concordat[81] was applied in *Everfresh Beverages Inc* and *Sundance Beverages Inc* (1997)[82] with the Ontario Court of Justice (General Division) in Bankruptcy and the United States Bankruptcy Court, Southern District of New York, approving a Cross-Border Insolvency Protocol to assist in the administration of concurrent proceedings.[83] The orders in both cases acknowledged that the Protocol was based on the IBA Cross-Border Insolvency Concordat.[84] However use of the Concordat was superseded by an UNCITRAL initiative.

UNCITRAL has promoted uniform recognition laws through States adopting a Model Law on Cross-border Insolvency 1997 (Model Law) and this approach is having much more widespread success in addressing cross border insolvency. At the time of writing, UNCITRAL's Model Law has been adopted in 19 jurisdictions, including Australia (2008), Canada (2009), Great Britain (2006), Greece (2010), Japan (2000), New Zealand (2006), Republic of Korea (2006), and the United States of America (2005).[85] It contains uniform recognition laws – and provides a mechanism for cooperation between jurisdictions and the coordination of concurrent proceedings.

However, when each State adopts the Model Law as part of domestic legislation, it may amend its provisions and so the legislation and the procedures under the Model Law vary from jurisdiction to jurisdiction – sometimes in significant ways. For example, the United Kingdom permits but does not mandate court cooperation[86] and Japan did not enact the relevant Article at all, on the basis that Japanese courts already had inherent power to

---

[78] The accompanying Rationale implied that it may be the 'centre of management control': Cross-Border Insolvency Concordat (January 1994 edition) in Sigal M, Wagner, KE, Barrett JA, Flaschen ED, Leonard EB & Goodman HL, 'The Law and Practice of International Insolvencies, including a Draft Cross-Border Insolvency Concordat' in *Annual Survey of Bankruptcy Law (1994-1995)*.

[79] Principle 4.

[80] Nielsen A, Sigal M & Wagner K, 'The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies' (1996) 70 *American Bankruptcy Law Journal* 533 at 549.

[81] The Concordat was applied even before it was finally approved: *Re Hackett* 184 BR 656 (Bankr SDNY 1995).

[82] Leonard EB, 'Committee J's Initiatives in Cross-border Insolvencies and Reorganisations: The Experience of the Everfresh Case' (1997) 6 *International Insolvency Review* 127; Millett P, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *International Insolvency Review* 99 at 112; Flaschen ED & Silverman RJ, 'Cross-border Insolvency Cooperation Protocols' (1998) 33 *Texas International Law Journal* 587 at 592.

[83] These companies had filed a Notice of Intention to Make a Proposal to creditors in Canada where an Interim Receiver had been appointed under the *Bankruptcy and Insolvency Act.* They were also Debtors in a Chapter 11 case under the United States *Bankruptcy Code*. Approximately half the assets of the companies were in Canada and half in the United States.

[84] See Perry M, 'Lining Up at the Border: Renewing the Call for a Canada-US Insolvency Convention in the 21st Century' (2000) 10 *Duke Journal of Comparative & International Law* 469 at 486.

[85] http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

[86] Article 25(1) Cross-Border Insolvency Regulations 2006 http://www.bailii.org/uk/legis/num_reg/2006/20061030.html

cooperate with foreign courts.[87] As such the Model Law is likely to have a harmonising rather than uniforming effect.[88]

The four key principles underpinning the Model Law encourage uniform approaches to recognition and enforcement. The *access* principle establishes the circumstances in which a 'foreign representative' has rights of access to the receiving court in the enacting State from which recognition and relief is sought. Under the *recognition* principle, the receiving court may make an order recognising the foreign proceedings (either as a foreign main or non-main proceeding. The *relief* principle applies to three distinct situations. Interim relief may be granted to protect assets within the jurisdiction of the receiving court where an application for recognition is pending. Automatic relief applies if a receiving court recognises the foreign proceedings as a main proceeding.[89] Discretionary relief is available, in addition to automatic relief, in respect of main proceedings and also available where a receiving court recognises the foreign proceedings as non-main proceedings.

The *cooperation* and *coordination* principle places obligations on both courts and insolvency representatives in different jurisdictions to communicate and cooperate to the maximum extent possible, to ensure that the single debtor's insolvent estate is administered fairly and efficiently, with a view to maximising benefits to creditors.[90] Articles 25-26 mandate a local court or insolvency representative[91] to co-operate with foreign courts or foreign representatives - either directly or through representatives. Article 27 provides examples of appropriate means of cooperation.

Article 27(d) refers to the "Approval or implementation by courts of agreements concerning the coordination of proceedings". Increasingly, this is being implemented through the use of CBI Agreements (sometimes known as Protocols) which are approved by the courts. In Australia, Court Practice Notes refer parties to the ALI/III *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases* and the UNCITRAL *Practice Guide on Cross-border Insolvency Agreements* in formulating a proposed framework for cooperation under the Model Law.[92] In Canada, the Ontario Superior Court of Justice has officially approved

---

[87] Shinichiro Abe, 'Japan' in Ho LC (ed), *Cross-border Insolvency Law*, 2nd ed, Globe Law & Business, London, 2009.

[88] Graveson RH, 'The International Unification of Law' (1968) 16 *American Journal of Comparative Law* 4 at 8-9, promotes the use of model laws yet acknowledges 'that a jurisdiction is under no international obligation to apply it nor be required to accept it without variation'.

[89] Ongoing concerns about identifying the 'foreign main proceedings' based on COMI are being addressed by UNCITRAL Working Party V Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests. This topic was proposed by the United States and is intended to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law relating to centre of main interests (COMI). The more ambitious proposal is possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.

[90] UNCITRAL, The UNCITRAL Model Law on Cross-border Insolvency: the judicial perspective, pre release 20 July 2011 at p 7: http://www.uncitral.org/pdf/english/texts/insolven/pre-judicial-perspective.pdf .

[91] Such as a bankruptcy trustee or registered liquidator.

[92] Federal Court Practice Note Corp 2 Cross-border Insolvency Cooperation with Foreign Courts or Foreign Representatives: http://www.fedcourt.gov.au/how/practice_notes_corp2.html and NSW Supreme Court Equity Division Practice Note SC Eq 6 – Cross-Border Insolvency: Cooperation with Foreign Courts or Foreign

the adoption of CBI Agreements or Protocols for matters on the Commercial List in Toronto.[93]

3.4. Cross-border Insolvency Agreements

The growing use of CBI Agreements is the final response to cross-border insolvency issues to be discussed. Over recent decades they are arguably emerging as customary international commercial aw.

Even though UNCITRAL encourages court approval of CBI Agreements for the purposes of coordinating insolvency proceedings, such Agreements in fact pre-date the Model Law. A prominent example is the *Maxwell Communications Corporation plc* cross-border insolvency case in 1991, in which concurrent principal insolvency proceedings in the United States (Chapter 11 proceedings) and England (administration proceedings) were coordinated through an 'Order and Protocol' approved by the courts in the respective jurisdictions.[94]

The influence of this decision on the subsequent adoption of the custom or practice of CBI Agreements[95] and the evolution of the IBA Concordat led to some commentators in the late 1990s describing this practice as an example of customary international law for dealing with cross-border insolvency.[96] Gaa referred to an 'international common law on bankruptcy' and predicted that practical solutions being employed by practitioners to fundamental jurisdictional and other problems 'may well represent an evolving customary international law in this area'. He foreshadowed that they may be incorporated in international 'treaties' on insolvency 'cooperation' and thereafter be codified in local municipal law.[97]

Subsequent developments have borne this out. The practice of parties arriving at 'in effect' treaties to resolve cross-border insolvency issues and capturing this in CBI Agreements has been accelerated – most significantly through the Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases published by The American Law Institute (ALI) and The International Insolvency Institute (III) in 2001;[98] the European Communication &

Representatives:
http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/db2a09ee87866a04ca257577007983ae?OpenDocument

[93] Farley JM, 'Cooperation and Coordination in Cross-border Insolvency Cases' Paper presented at III Sixth Annual International Insolvency Conference, New York, 12-13 June 2006 at 42.

[94] Flaschen ED & Silverman RJ, 'The role of the examiner as facilitator and harmonizer in the Maxwell Communication Corporation international insolvency' in Ziegel JS (ed) *Current Developments in International and Comparative Corporate Insolvency Law*, Clarendon Press, Oxford, 1994 at 629.

[95] The 1993 *Olympia & York Realty Company* case (New York and Ontario) - see Millett P, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *International Insolvency Review* 99 at 111 and Leonard EB, 'The International Scene: The Way Ahead: Protocols in International Insolvency' (1998) *American Bankruptcy Institute Journal* 191 at 195.

[96] Culmer DH, 'The Cross-Border Insolvency Concordat and Customary International Law: Is It Ripe Yet?' (1999) 14 *Connecticut Journal of International Law* 563; Gaa T, 'Harmonization of International Bankruptcy Law and Practice: Is it possible?' (1993) 27 *The International Lawyer* 881 at 882.

[97] Gaa TM, 'Harmonization of Bankruptcy Law and Practice – Is it Necessary Is It Possible?' (1993) 27 *International Lawyer* 881 at 902-3.

[98] http://www.ali.org/doc/Guidelines.pdf

Cooperation Guidelines for Cross-border Insolvency adopted by INSOL Europe in 2008;[99] and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation adopted in 2009.[100] Contemporary developments are also likely to maintain the momentum - the III Committee on International Jurisdiction and Cooperation work on a Prospective Model International Cross-border Insolvency Protocol[101] and the III/ALI Project on Principles for Cooperation in International Insolvency Cases. The latter's objective is for the III and ALI "to encourage consideration of the Principles in jurisdictions across the world, subject to appropriate local modifications, and to obtain the endorsement of influential domestic associations, courts, and other groups in those jurisdictions." [102]

The UNCITRAL *Practice Guide on Cross-Border Insolvency Cooperation* (2009) notes in its introduction that the information it contains 'is based upon a description of collected experience and practice and focuses on the use and negotiation of cross-border insolvency agreements, providing an analysis of a number of those agreements'.[103] This highlights the significance of a growing international custom around their use.

In its survey of CBI Agreements, the Practice Guide refers to a case dating back to 1908 – the decision of *Re P MacFadyen & Co.* In that case, the court commented that 'such an agreement is a "proper and common-sense business arrangement to make, and one manifestly for the benefit of all parties interested"'.[104] As such, it exemplified a pragmatic approach by the parties to resolving issues where an insolvent debtor had carried on business through two companies, one located in England and the other in India.[105]

CBI Agreements typically come into effect through negotiation between the parties prior to their presentation to courts for review and approval – while providing for 'the independence of the courts' and affirming 'the principle of comity'.[106] These negotiations may take place either prior to the commencement of or during the insolvency proceedings. Depending on the circumstances, more than one agreement may be negotiated where needed to cover different issues.[107]

The Guide suggests that in time these CBI Agreements 'may become the norm in cases with a significant international element', even though the cases surveyed were limited to a handful of jurisdictions.[108] While there are a number of protocols approved in cases

[99] Wessels B, 'European Communication and Cooperation Guidelines for Cross-Border Insolvency' (2007) 4 (4) *ABI Committee News*
http://www.abiworld.org/committees/newsletters/international/vol4num4/European.html
[100] http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf.
[101] Leonard B & Bellissimo JJ, Prospective Model International Cross-border Insolvency Protocol [Annotated] 17 June 2009 (on file with author).
[102] American Law Institute, Current Project on Transnational Insolvency: Principles of Cooperation, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=18 The final report is due for consideration by III and ALI in 2012.
[103] *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, p 1.
[104] [1908] 2 KB 817.
[105] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, p 23.
[106] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, p 32.
[107] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, p 26.
[108] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, p 23.

between common law jurisdictions, they have also been approved in civil law jurisdictions – as exemplified in the Lehman Brothers protocol.[109]

The evolution of CBI Agreements justifies classifying the approach as a customary law of international commercial transactions (or law merchant).[110] In order to address the problems associated with cross-border insolvencies, parties have created ad hoc unique transactions captured in CBI Agreements. This occurred in the *Re P MacFadyen & Co* case and the Maxwell case. Over time, such transactions have been repeated, with template documents emerging as customs. These have in turn been adopted as model rules by multilateral organisation and professional associations. All these then represent a modern 'law merchant' that is recognised in State laws which facilitate the transaction. This has occurred through domestic adoptions of the Model Law and through complementary regulation such as Court Practice Notes.

3.4.1. International Mercantile Community and CBI Agreements

The international mercantile community engaged in this process has included the merchants (debtors and creditors and other parties of interest), financiers,[111] and, significantly for the development of common understandings, insolvency representatives.

Within common law jurisdictions such as England and Australia, insolvency representatives are typically accountants, who employ specialist lawyers to assist with commercial litigation and advice work.[112] In other jurisdictions, such as the United States, lawyers are appointed to insolvency proceedings and employ specialist accountants as required.[113] The UNCITRAL Model Law emphasises practitioners' importance in resolving cross-border insolvency issues through the centrality of recognition of foreign insolvency representatives. The UNCITRAL Practice Guide also refers to the role of the insolvency profession in developing CBI Agreements as they were faced with:

[109] Also, see Lucas Daum, "The Future of Cross-border Insolvency Protocols', Leiden Law School November 2009 - Master Thesis, Supervisor Professor Bob Wessels; Adjunct Supervisor Honourable Justice James Farley QC, Canada.

[110] This evolution parallels a description of cross-border securitization, for example swaps, as an evolving new customary law: Cross-border securitization has required parties supplement inadequate domestic laws through the contractual drafting, such steps being repeated and accepted as customs that 'in turn are absorbed into model contracts and rules of trade and professional associations, international ad hoc and standing committees, and domestic laws that facilitate the securitization process': Frankel T, 'Cross-border Securitization: without law, but not lawless' (1997-1998) 8 *Duke Journal of Comparative and International Law* 255 at 275.

[111] For example, one of the special interest groups within INSOL International, the federation of insolvency practice professional bodies, is the INSOL Lenders Group.

[112] The reason for this, according to extra-judicial comments by Lord Hoffmann, was the importance of the floating charge to the development of English insolvency law and practice. The persons appointed by the banks as receivers to take charge of the conduct of the business and the realisation of the assets were traditionally accountants: Hoffmann L, 'Colloquium: Cross-Border Insolvency: A British Perspective' (1996) 64 *Fordham Law Review* 2507 at 2508.

[113] Millett P, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *International Insolvency Review* 99 at 109.

> the daily necessity of dealing with insolvency cases and attempting to coordinate administration of cross-border insolvencies in the absence of widespread adoption of facilitating national or international laws.[114]

These insolvency representatives play a role in negotiating commercial solutions to overcome the many legal issues in cross-border insolvencies. As an English court commented during complex cross-border insolvency litigation in the 1990s, 'the accountancy profession has managed to achieve, at least in part, a worldwide system for regulating international insolvency which the civilised countries of the world have failed to achieve so far as the law is concerned.'[115] Cross-jurisdictional links within the relevant professions are increasing through international accounting and legal firms.[116]

The UNCITRAL *Practice Guide on Cross-Border Insolvency Cooperation* (2009) noted that "[t]he absence of formal treaties or domestic legislation to address the problems arising from international insolvencies has encouraged insolvency practitioners to develop, on a case-by-case basis, strategies and techniques for resolving the conflicts that arise when the courts of different States attempt to apply different laws and enforce different requirements upon the same set of parties. The terms and duration of agreements vary, and amendment or modification in the course of the proceedings takes account of the changing dynamics of a multinational insolvency to facilitate solutions for unique problems that arise in the course of the proceedings."[117]

Not only have such professional advisers contributed as individuals or through their firms, they have also played a role as members of professional associations[118] in the evolution of CBI Agreements. These associations include academic members whose contributions are also proving to be significant.[119]

The IBA has contributed to international efforts through the notion of a Concordat and through contributing to UNCITRAL deliberations, for example on the Model Law. One of the objectives of its Section on Insolvency Restructuring and Creditors' Rights is to provide a forum for the examination and improvement of systems to manage financial distress and to cope with insolvency and the restructuring of troubled enterprises in a global economy.

---

[114] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009, p 19.
[115] *Re BCCI (No 2)* [1992] BCLC 579 at 581.
[116] 'In the early days of the BCCI liquidation, a great deal of reliance was placed on the fact that a single accounting firm was handling the worldwide liquidation. The English court, in particular, was delighted that only one firm was involved': Shandro S, 'Judicial Cooperation in Cross-Border Insolvency – The English Court takes a Step Backwards in BCCI (No. 10)' (1998) 7 *International Insolvency Review* 63 at 68. For a less benign view of the role of bankruptcy professionals in industrialised countries promoting universalism in their own interests, see Tung F, 'Scepticism about Universalism: International Bankruptcy and International Relations', (2001) UC Berkley Law and Economics Working Paper Series, Working Paper 2001 – 7, at 13 footnote 47, at 22 footnote 74 and at 27 footnote 92.
[117] *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* 2009, p 16.
[118] Such as INSOL International; the International Insolvency Institute and the International Bar Association.
[119] For example, Professor Fletcher (UK) and Professor Wessels (Netherlands) have taken a leading role in the III/ALI Project on Principles for Cooperation in International Insolvency Cases.

Another objective is to staff the IBA's commitments to 'world bodies' which focus on insolvency and restructuring issues. It is an Official Observer to the UNCITRAL Working Group V on Insolvency Law. It also works closely with multilateral institutions such as the World Bank, the International Monetary Fund, the Asian Development Bank and the Group of Thirty[120] and with specialist professional insolvency associations.[121]

Following the financial crisis of the late 2000s, the IBA established a Taskforce of senior banking lawyers on the global financial crisis. Its role is to contribute to the search for efficient and lasting solutions to the problems confronting the world's financial markets as well as those who depend on the resumption of an efficient and appropriate global market system. The Taskforce has since issued a number of reports, including a 2010 survey of regulatory trends in the United States; United Kingdom; Germany; Switzerland; France; Spain and Russia.[122]

Another professional association that has contributed to the customary law of international commercial transactions relevant to cross-border insolvency is the International Insolvency Institute (III).[123] It has worked with the American Law Institute on the *Guidelines Applicable to Court-to-Court Communication in Cross-Border Cases* as well as the *Principles for Cooperation in International Insolvency Cases*. Its goals and objectives include promoting greater international co-operation and co-ordination in insolvencies and reorganisations through improvements in the law and in legal procedures. Among its various Committees is a Committee on International Jurisdiction and Coordination which "focuses on assessing and developing structures to enhance and improve the coordination of international insolvencies and restructurings including the use of Court Communications and Cross-Border Insolvency Protocols and other structural means of improving coordination between courts."[124]

INSOL has also contributed to the development of the Model Law and has supported a number of Judicial Colloquia on cross-border insolvency. A particular contribution has been its 2000 publication, *Principles for a Global Approach to Multi-creditor Workouts*, [125] which sets out eight principles as statements of best practice for all multi-creditor workouts together with a commentary on the Principles generally and on each Principle separately. The principles are intended to be jurisdiction-neutral and applicable in all jurisdictions with developed insolvency laws. It acknowledges that the principles as well as the commentaries may well be supplemented locally depending on an individual state's circumstances and needs.

---

[120] http://www.group30.org/

[121] For example INSOL International, the Association of European Insolvency Practitioners and national insolvency specialist organisations http://www.ibanet.org/LPD/SIRC/Inslvncy_Rstrcrng_Crdtrs_Rights/Overview.aspx

[122] http://www.ibanet.org/LPD/Task_Force_on_the_Financial_Crisis.aspx.

[123] It is "a non-profit, limited-membership organization dedicated to advancing and promoting insolvency as a respected discipline in the international field. Its primary objectives include improving international co-operation in the insolvency area and achieving greater co-ordination among nations in multinational business reorganizations and restructurings": http://iiiglobal.org/

[124] http://iiiglobal.org/committees.html

[125] http://www.insol.org/pdf/Lenders.pdf

5. Conclusion

The previous section through a compact overview provides a sense of the active process of legal transnationalisation that has been occurring in the area of cross-border insolvency since the late twentieth century. It not only summarises the approaches being taken but also some of the parties involved. In light of the evolution of CBI Agreements, some concluding comments are made linking this development and the notion of international commercial law.

Professor Schmitthoff's description of a developing international business law has been borne out by the growing commercial understandings and practices of an international business community concerned with cross-border insolvencies. Even Professor Goode's more restricted definition of an international commercial law or law merchant as one confined to 'the international practice of merchants' is arguably appropriate.

State or multilateral responses that rely on uniform insolvency laws, choice of law rules or recognition laws through international conventions (or model laws for domestic enactment) may well not qualify as law merchant. However, the increasingly common development by parties of CBI Agreements, a practice encouraged by multilateral organisations and by courts, is recognisable as a modern form of international commercial law or law merchant.

This legal transnationalisation of cross-border insolvency law and the increasing use of CBI Agreements has practical implications. It supports Lord Hoffmann's approach in *McGrath v Riddell* in relying upon an inherent jurisdiction of superior courts in common law jurisdictions to cooperate with relevant foreign courts in managing concurrent cross-border proceedings. Such a jurisdiction exists regardless of domestic statutory provisions permitting cooperation between jurisdictions – whether based on domestic insolvency laws (similar to s 426 *Insolvency Act 1986* (UK)) or on domestic adoptions of the UNCITRAL Model Law on Cross-border Insolvency. It also means that courts from diverse legal systems may recognise CBI Agreements as a form of customary international commercial law and so cooperate with concurrent foreign proceedings in the absence of specific domestic provisions.

This article has examined a range of modern responses to cross-border insolvency issues and placed recent developments in a broader international commercial law context. As such, the increasingly common practice of negotiating CBI Agreements that are then approved by courts is arguably a modern form of customary law or law merchant. In his inaugural lecture as Professor of International Insolvency Law, University of Leiden, Professor Wessels opined that 'the protocol-method could even be regarded as Lex Mercatoria in international insolvency cases. The question might even be posed whether the Guidelines and related Protocols provide a substitute for a possible convention or treaty and could be regarded as "customary international law"' and therefore a potential source of international public law.[126] Thus CBI Agreements may well prove to be one of the most useful strategies for resolving complex cross-border insolvency issues.

[126] Wessels, B, 'Judicial Cooperation in Cross-border Insolvency Cases' at8 http://bobwessels.nl/wordpress/wp-content/uploads/2009/06/leiden-inaug-lecture-short-version.pdf . Professor Wessels refers to Article 38 of the Statute of the UN International Court of Justice and the International Court of Justice applying amongst other things, 'international custom, as evidence of a general practice accepted as law'.